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No. 90-882

In The

Supreme Court of the United States

October Term, 1990

PAULA PHELAN, an individual and a member of the Kansas City, Missouri Police Department, and RICHARD BERKLEY, ARTHUR D. BROOKFIELD, II, BEVERLEY BARKER NICKS, JOHN L. WILLIAMS, MICHAEL B. MEADE AND LARRY JOINER, as individuals and as Members Constituting THE KANSAS CITY MISSOURI BOARD OF POLICE COMMISSIONERS,

Appellants,

v.

MICHAEL TAYLOR AND BRENDA TAYLOR, in their own right and as parents and natural guardians of MICHAEL ANDREW TAYLOR, a minor, and as the surviving mother and father and surviving heirs at law and co-administrators of the Estate of JESSICA TAYLOR, deceased,

Appellees.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Is The Petition For Certiorari Fatally Defective Because It Raises A New Theory Than That Briefed And Argued Below And Because It Raises An Issue That Need Not Be Decided At This Time?

2. Did The Court Of Appeals Err When It Determined That There Were Sufficient Minimum Contacts Such That There Was Personal Jurisdiction Over Defendant?

3. Does The Status Of Defendants As Public Employees Mean That Personal Jurisdiction Over Them Cannot Constitutionally Be Exercised?

CITATIONS OF THE OPINIONS AND JUDGMENTS DELIVERED IN THE COURTS BELOW

Appellees agree with appellants' statement.

JURISDICTION

Appellees agree with appellants' statement.

PARTIES

Appellees agree with appellants' statement.

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I.
APPELLEES' ADDITIONS AND OBJECTIONS TO THE STATEMENT OF THE CASE

Plaintiffs respectfully object to defendants' portrayal of their basis for jurisdiction as the solitary contact with Detective Phelan. The fact is, and the record so reflects, that during the three week continuum between the first interview with defendants and the attack, there were dozens of contacts back and forth across the state line. Five of the officers in the Sex Crimes Unit, including the captain, had talked with plaintiffs. Three of these had contact with the assailant, Moore, and at least two of these met with plaintiffs. All of these contacts were with the state of Kansas.

Evidence adduced at deposition and included in the record supported the claim that the Kansas City, Missouri Police Department would routinely investigate cases in Kansas. The police station and courthouse in Kansas City, Missouri, are located closer to plaintiffs' home in the adjacent Kansas City, Kansas than to the scene of the initial incident which occurred in Clay County, Missouri. When Detective Phelan and Detective Wessler came to Kansas to interview Mrs. Taylor, that investigation was performed during their regular shift and pursuant to their regular duties as detectives in the Sex Crimes Unit of the Police Department.

In addition, Det. Wessler contacted the assailant, Moore, at his home in Kansas to notify him that an arrest warrant had been issued for Moore's arrest without the immediate means to effect that arrest. An expert witness on police procedure has termed the action of Det. Wessler "a serious breach of police procedure (which) place the victim in peril, a fact which should have been known to a reasonable police officer." (Court of Appeals decision,

Appendix A, pg. App. 11). A few days later, Moore committed the act complained of. All of these occurred in Kansas.

Plaintiffs will admit that Det. Phelan has testified by affidavit that her contacts with plaintiffs in Kansas were brief and attenuated and only to pick up a medical report. She stated flatly that she did not assure the Taylors of their safety. But the number of telephone calls belies the randomness of the contacts. And Brenda Taylor, in her affidavit, states that Det. Phelan did in fact assure her of safety and for that reason took no substantial further efforts to protect herself against the feared attack.

Det. Phelan's deposition has not been taken at defendants' behest (discovery has not been concluded). But Det. Wessler testified that during his visit with Det. Phelan to plaintiffs' home, they peered out the back window to see the house where Moore lived. It is inconceivable that in that same conversation they did not discuss the Taylors' fear of attack from Moore and the Taylors's safety from that attack.

II.
REASONS WHY CERTIORARI SHOULD NOT BE GRANTED

A. Summary of Argument

Defendants raise a new theory, a new tact in this Petition that one jurisdiction may not exercise over the employees of another jurisdiction, albeit that those employees injure the residents of the forum jurisdiction. Defendants apparently concede for these purposes that plaintiffs have alleged sufficient facts against them with regard to the tort committed in the forum. They are contending here the constitutional underpinnings to the reasonable exercise of the state long-arm statute. It is

plaintiffs' position, and supported by recent authority and as well the public policy behind it, that defendants' employees should be treated the same as any other government employees in the forum jurisdiction.

Defendants also contend that the insufficiency of allegations made against them individually. But here in plaintiffs' carefully crafted petition, there are sufficient allegations set out supported by the discovery which has transpired in this case.

B. Appellant's Raise a New Theory in Their Petition to the Supreme Court

Plaintiffs' theory here is substantially different than that briefed and argued in District Court and to the Circuit Court of Appeals. The contention before the Tenth Circuit was whether defendants' activities within the forum satisfied the minimum contacts requirement such that they may sue in the forum state. Here, rather, defendants contend that the exercise of jurisdiction over the activities of police employees of an adjacent city constitutes a constitutional deprivation in and of itself. The primary case cited by defendants (where they rely upon the dissenting opinions.), *Nevada v. Hall,* 440 U.S. 410, 99 S.Ct. 1182, 59 L.Ed.2d 416 (1979) was not even cited to the Court of Appeals.

It is also premature for the Court to consider this new theory. This case comes to this Court from an appeal from the lower court sustaining defendants' motion for judgment on the pleadings. That motion, filed only a month after the pleadings were closed, contended that there was no personal jurisdiction over defendants. As noted, the only question decided by the Circuit Court of Appeals was whether defendants had sufficient minimum contacts in the forum state. The issue concerning liability as governmental employees was not even reached.

This issue is exemplified by *Nevada v. Hall,* the very case that defendants claim supports their proposal. In the initial court determination, the lower court had sustained defendant State's motion to quash service on the jurisdiction issue. That was reversed in the California Supreme Court by a holding that there was jurisdiction. (105 Cal.Rptr. 355, 503 P.2d 1363, 81 ALR3d 1234 (1973)). This Court denied certiorari. 414 U.S. 820, 94 S.Ct. 114, 38 L.Ed.2d 52 (1973).

The case was then tried resulting in a judgment for plaintiff. It was that later judgment that was ruled upon by this Court in the 1979 decision which forms a large part of defendants' case. In the instant case, however, we have not even reached that second phase where appeal to this Court is appropriate.

C. Defendants' Status as Employees of Governmental Entities Should not Defeat Plaintiffs' Right to Bring The Lawsuit in an Otherwise Appropriate Jurisdiction.

Defendants contend by citing dissenting opinions in *Nevada v. Hall,* supra, as well as in *Garcia v. San Antonio Metropolitan Transit Authority,* 469 US 528, 105 S.Ct. 1005, 83 L.Ed.2d 1046 (1985) that jurisdiction over governmental employees should be held to a stricter standard than over the general populace. The contention suffers immediately from lack of logical connection.

It is true that there are imposition of limits on the liability of governmental employees both in Kansas, as well as in Missouri and in most jurisdictions. However, the right to bring suit against such persons where the same would be permitted against private persons is well documented.

The basis of jurisdiction here is the Kansas long-arm statute, K.S.A. 60-308(b)(2), which provides in standard fasion that "the commission of a tortious act within this

State" either "in person or through an agent or instrumentality" will provide a jurisdictional basis for suit against the perpetrator. The lower court found and as recognized by the Court of Appeals (App. 7), that defendants had acceded to the jurisdiction of Kansas for the purpose of the Kansas long-arm statute.

Defendants appear to concede that they are subject to the Kansas long-arm statute. They do dispute the constitutional underpinnings to that Act in asserting that it is a violation of due process for them to have been sued in Kansas. Yet, to hold that employees of a sister state could not be sued in Kansas in tort would result in granting them greater immunity than enjoyed by governmental employees of Kansas who had committed the same act. *Hall v. University of Nevada,* 105 CalRptr 355, 503 P.2d 1363, 81 ALR3d 1234, 1238 (1972), cert. denied 414 US 820, 94 S.Ct. 114, 38 LEd2d 52.

Defendants finally contend that because the defendants here are state employees, that as a matter of comity, this court should balance interests and public policy in the respective jurisdictions. But it is immediately apparent here again defendants raise choice of law questions when the lower courts dealt only with jurisdiction.

Even if this appeal is concerned with competing state laws, the tort here occurred in Kansas. The rule is that a state is not bound to enforce a sister state's law in face of its own statute, particularly when there is strong public policy to support it. *Nevada v. Hall,* supra, 440 US at 422; *Pacific Employers Insurance Company v. Industrial Accident Commission,* 306 US 493, 59 S.Ct 629, 83 LEd 940 (1938).

The public policy in favor of enforcement of Kansas law could not be stronger. The enactment of the Kansas Tort Claims Act came about as a result of litigation

following the catastrophic airplane crash which devastated the University of Wichita football team. Initially the Kansas Supreme Court invalidated governmental immunity, but in the second opinion, *Brown v. Wichita State University*, 219 Kan. 2, 547 P.2d 1015 (1976), the Court reconsidered and upheld governmental immunity but with reservations. In his concurring opinion, Chief Justice Fatzer expressed his fear that the decision of the court may go unheralded. He stated further:

> "I can only hope that, instead, the Legislature will respond to this decision of the court with a critical and searching re-examination of these statutes. An abundance of evidence is at hand which convincingly demonstrates it is both desirable and feasible that government at all levels accept increased responsibility for its actions. I look forward to the day the Legislature enacts new measures more in keeping with the needs of Kansas citizens and Kansas government." *Brown,* supra, 219 Kan. at 40.

The Kansas Legislature responded with adoption of the Tort Claims Act two years later, effective in 1979.

D. There is Jurisdiction in the Forum State Over Defendants Members of the Board of Police Commissioners in Their Individiual Capacities.

Defendants contend that plaintiffs have failed to allege and show sufficient allegations against the members of the Board of Police Commissioners acting in their individual capacities. They complain they are bound, if at all, vicariously only in their official capacities.

Defendants ignore the fact that the claims against the particular Board Members are not by virtue of a vicarious relationship, but rather because they individually "knew

or should have known of the issuance and maintenance of improper policies or the failure of others to obey proper policies that allowed Michael Moore to remain free and cause injury and damage to plaintiffs." (Petition, Par. 22) This would both be true of plaintiffs' claims at common law and by virtue of the Tort Claims Act, and, as well under 42 U.S.C., Sec. 1983. A defendant may be personally involved in a deprivation because he or she created a policy or custom in violation of constitutional rights, or allowed such a policy to continue. *Turpin v. Mailet,* 619 F.2d 196 (2d Cir., 1980), cert. denied 449 US 1016, 101 S.Ct. 577, 66 L.Ed.2d 475 (1980).

As noted, plaintiffs contend and have submitted evidence that notifying a suspected child molester of his impending arrest without being able to effect that arrest is a negligent act. That this was a result of the continuance of an improper policy is supported by the fact that despite repeated discovery requests, defendants have as yet failed to reveal a policy or guideline to prevent it.

III.
CONCLUSION

E. The Question Before the Court is Whether There are Sufficient Minimum Contacts; Plaintiffs' Burden is Only Minimal.

It should be clearly apparent that plaintiffs had both alleged and proved sufficient contacts—the numerous telephone calls, the visit to plaintiffs' home on Halloween night, the contact of Det. Phelan that night with the assailant Moore, the telephone call from Wessler to Moore—that defendants be subject to personal jurisdiction in Kansas. After revewing the factual circumstances, the Court of Appeals found that personal jurisdiction existed.

In rebuttal, defendants point to only two portions of plaintiffs' Petition and a statement taken out of context in a routine discovery request. Defendants have ignored the statement in paragraph 18 where plaintiffs describe the contacts and visit of Detective Phelan. And they further ignore the contention in that same paragraph and paragraph 20 of the Petition where plaintiffs allege that by reason of the assurance of safety by all of the telephone contacts and the visit to plaintiffs' home, that a special relationship had developed. While it is true that plaintiffs did not mention Detective Wessler's telephone call or his visit to Kansas at the time of drafting the petition, they were not sure who made the telephone call and were unaware that it was Wessler who came to Kansas with Phelan. This latter fact was denied in defendants' answers to the initial sets of interrogatories. It was not until Wesler's deposition that these matters came to light. At that point, while defendants' motion was pending but

within the applicable statute of limitations, plaintiffs' attorney notified defendants' attorney that he intended to make Wessler a defendant. The lower court's order dismissing the action was issued a few days later.

The question before this Court is the one ruled upon below, whether defendants' agents had sufficient minimum contacts with the forum state in order that defendant may be sued there. While plaintiffs admit that the burden of proof is theirs, it is only a minimal burden. *Ammon v. Kaplow,* 468 F.Supp. 1304 (D. Kan. 1978). When a motion as this is decided on the basis of affidavits and other written materials, the plaintiff need only make a prima facie showing. *American Land Program, Inc. v. Bonaventura Uitgevers Maatschappij, N.V.,* 710 F.2d 1449 (10 Cir., 1983). The allegations in the complaint must be taken as true to the extent they are uncontroverted, and all factual disputes are to be resolved in the plaintiffs' favor. *American Land Program,* supra; *Behagen v. Amateur Basketball Association of U.S.A.,* 744 F.2d 731 (10 Cir. 1984).

The Petition of Certiorari should be denied because the decision of the Court of Appeals does not involve a substantial federal question but instead focuses on the par-

ticular factual allegations of this case. Moreover, defendants have attemped to change their theory of appeal at the last minute and by so doing are asking the Court to consider matters not fully addressed below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that five copies of the foregoing were mailed to Mr. J. Emmett Logan, Morrison, Hecker, Curtis, Kuder & Parrish, 14 Corporate Woods, 8717 West 110th Street, Suite 520, P.O. Box 25217, Overland Park, Kansas 66225-5217, attorneys for Petitioners, on this 28th day of December, 1990.

